



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES - Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

Arizona Corporation Commission

DOCKETED

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IN THE MATTER OF THE APPLICATION
ZAYO BANDWIDTH, LLC FOR APPROVAL
OF A CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE FACILITIES-BASED
LOCAL EXCHANGE AND RESOLD AND
FACILITIES-BASED PRIVATE LINE
TELECOMMUNICATIONS SERVICE IN
ARIZONA.

DOCKET NO. T-20694A-09-0379

DECISION NO. 71781

OPINION AND ORDER

DATE OF HEARING: April 30, 2010

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey

APPEARANCES: Mr. Michael Hallam, LEWIS AND ROCA, LLP, on
behalf of Applicant; and

Ms. Ayesha Vohra, Staff Attorney, Legal Division, on
behalf of the Utilities Division of the Arizona
Corporation Commisison.

BY THE COMMISSION:

On July 31, 2009, Zayo Bandwidth, LLC ("Zayo" or "Company") filed with the Arizona Corporation Commission ("Commission") an application for a Certificate of Convenience and Necessity ("CC&N") to provide facilities-based long distance and facilities-based local exchange telecommunications services in Arizona. Zayo's application also requests a determination that its proposed services are competitive.

On November 30, 2009, Zayo filed an amended application, clarifying that Zayo is requesting to provide facilities-based local exchange and resold and facilities-based point-to-point private line telecommunications services in Arizona.

On February 26, 2010, the Commission's Utilities Division staff ("Staff") filed a Staff Report recommending approval of Zayo's amended application, subject to certain conditions.

1 On March 3, 2010, Zayo filed a request for an expedited hearing, stating that Zayo desires to
2 enter the Arizona market as soon as possible.

3 On March 16, 2010, by Procedural Order, the hearing in this matter was set for April 30,
4 2010, and other procedural deadlines were established.

5 On April 13, 2010, Zayo docketed an affidavit stating that the hearing date had been
6 published in the *Arizona Republic*, a newspaper of general circulation in the proposed service area, on
7 March 31, 2010.

8 On April 30, 2010, a full public hearing was convened as scheduled before a duly authorized
9 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. Staff and Zayo
10 appeared through counsel and presented evidence and testimony. No members of the public appeared
11 to give public comment. At the conclusion of the hearing, Staff was directed to docket a late-filed
12 exhibit related to Zayo's complaint history.

13 On the same date, Staff filed its late-filed exhibit.

14 After receipt of Staff's late-filed exhibit, the matter was taken under advisement pending
15 submission of a Recommended Opinion and Order to the Commission.

16 * * * * *

17 Having considered the entire record herein and being fully advised in the premises, the
18 Commission finds, concludes, and orders that:

19 **FINDINGS OF FACT**

20 1. Zayo is a foreign, limited liability corporation, organized under the laws of Delaware,
21 with its principal place of business in Louisville, Colorado.

22 2. Zayo is a wholly owned subsidiary of Zayo Group, LLC, a privately held
23 telecommunications services holding company.

24 3. On July 31, 2009, Zayo filed an application requesting a CC&N to provide facilities-
25 based long distance and facilities-based local exchange telecommunications services. Subsequently,
26 Zayo amended its CC&N application clarifying that it is requesting to provide facilities-based local
27 exchange services and resold and facilities-based point-to-point private line telecommunications
28 services. Zayo also request that its proposed services be classified as competitive.

1 4. Notice of the amended application was given in accordance with the law.

2 5. Staff recommends that the Commission approve Zayo's amended application for a
3 CC&N to provide facilities-based local exchange and resold and facilities-based private line
4 telecommunication services.

5 6. Staff further recommends that:

- 6 a. Zayo comply with all Commission Rules, Orders, and other requirements
7 relevant to the provision of intrastate telecommunications services;
- 8 b. Zayo comply with federal laws, federal rules and A.A.C R14-2-1308 (A), to
9 make number portability available;
- 10 c. Zayo abide by the quality of service standards that were approved by the
11 Commission for Qwest in Docket No. T-01051B-93-0183;
- 12 d. Zayo be prohibited from barring access to alternative local exchange service
13 providers who wish to serve areas where Zayo is the only local provider of
14 local exchange service facilities;
- 15 e. Zayo provide all customers with 911 and E911 service, where available, or will
16 coordinate with incumbent local exchange carriers ILECs and emergency
17 service providers to provide 911 and E911 service in accordance with A.A.C.
18 R14-2-1201(6)(d) and Federal Communications Commission 47 CFR Sections
19 64.3001 and 64.3002;
- 20 f. Zayo notify the Commission immediately upon changes to Zayo's name,
21 address or telephone number;
- 22 g. Zayo cooperate with Commission investigations including, but not limited to
23 customer complaints;
- 24 h. The fair value rate base information provided for Zayo not be given substantial
25 weight in this analysis;
- 26 i. If at some time in the future Zayo does not collect advances, deposits, and/or
27 prepayments from its customers, Zayo should file a request for cancellation of
28 its established performance bond or irrevocable sight draft letter of credit
("ISDLC") and any such request should reference the Decision in this docket
and explain Zayo's plans for cancelling those portions of the performance bond
or ISDLC.
- j. In the event Zayo discontinues and/or abandons its service area, Zayo must
provide to both the Commission and its customers notice as set forth in A.A.C.
R14-2-1107;
- k. Zayo offer Caller ID with the capability to toggle between blocking and
unblocking the transmission of the telephone number at no charge;
- l. Zayo offer Last Call Return service that will not return calls to telephone
numbers that have the privacy indicator activated;

- 1 m. The Commission authorize Zayo to discount its rates and service charges to the
2 marginal cost of providing the services.

3 7. Staff recommends that Zayo's CC&N should be considered null and void, after due
4 process if Zayo fails to comply with the following conditions:

- 5 a. Zayo shall docket conforming tariffs for each of its proposed services within
6 365 days from the date of a Decision in this matter, or 30 days prior to
7 providing service, whichever comes first. The tariffs submitted to the
8 Commission should coincide with the services described in Zayo's amended
9 application.

- 10 b. Zayo shall:

- 11 i. Procure either a performance bond or ISDLC equal to \$100,000. The
12 minimum performance bond or ISDLC of \$100,000 should be
13 increased if at any time it would be insufficient to cover advances,
14 deposits, and/or prepayments collected from Zayo's customers. The
15 performance bond or ISDLC should be increased in increments of
16 \$50,000. This increase should occur when the total amount of
17 advances, deposits, and/or prepayments is within \$10,000 of the total
18 \$100,000 performance bond or ISDLC amount.

- 19 ii. Docket proof of the original performance bond or ISDLC with the
20 Commission's Business Office and 13 copies of the performance bond
21 or ISDLC with Docket Control, as a compliance item in this docket,
22 within 90 days of the effective date of a Decision in this matter or 10
23 days before the first customer is served, whichever comes earlier. The
24 performance bond or ISDLC should remain in effect until further order
25 of the Commission. The Commission may draw on the performance
26 bond or ISDLC on behalf of and for the sole benefit of Zayo's
27 customers, if the Commission finds, in its discretion, that Zayo is in
28 default of its obligations arising from its CC&N. The Commission may
 use the performance bond or ISDLC funds, as appropriate, to protect
 Zayo's customers and the public interest and take any and all actions
 the Commission deems necessary, in its discretion, including, but not
 limited to returning prepayments or deposits collected from Zayo's
 customers.

- iii. As a compliance filing, Zayo shall notify the Commission that it has
 started providing service in Arizona within 30 days of the first
 customer being served.

- iv. If at some time in the future, Zayo does not collect advances, deposits
 and/or prepayments from its customers, Zayo should file a request for
 cancellation of its established performance bond or ISDLC regarding
 its facilities-based local exchange and private line telecommunications
 services. Further any such request should reference the Decision in this
 docket and explain Zayo's plans for cancelling those portions of the
 performance bond or ISDLC.

- c. Zayo should abide by the Commission adopted rules that address Universal
 Service in Arizona, which indicates that all telecommunications service
 providers that interconnect into the public switched network shall provide

funding for the Arizona Universal Service fund. Zayo should make the necessary monthly payments required under by A.A.C. R14-2-1204(B).

Technical Capability

8. Zayo proposes to offer its facilities-based local exchange and resold and facilities-based private line services to large enterprises, government, and wholesale customers only.¹ According to the Staff Report, Zayo's proposed private line services include point-to-point, point-to-multipoint and multipoint-to-multipoint services, dark fiber, and last mile dedicated connectivity between intrastate locations.²

9. According to Zayo's amended application, Zayo is authorized to provide services similar to those proposed in Arizona in Colorado, Idaho, Illinois, Michigan, Minnesota, Ohio, Pennsylvania, Texas, and Washington.³ Although Zayo has not begun providing services in those states, Zayo's affiliates⁴ are currently providing telecommunications services in 16 other states and the District of Columbia.⁵

10. Zayo attached to its amended application, the biographies of its top management officers. Zayo's top five executives have more than 60 years experience in the telecommunications industry.⁶

11. Staff concluded that Zayo has the technical capability to provide its proposed services in Arizona.

Financial Capability

12. Zayo was formed on April 22, 2008, and at the time of filing the amended application had limited financial information.⁷ Zayo provided audited financial statements for Zayo Group, LLC and its subsidiaries, including Zayo Bandwidth, LLC, showing that the entities had total consolidated assets of \$359,688,000; total equity of \$178,091,000; and a net loss of (\$1,533,000).⁸

¹ Amended Application, Tariff at 8.

² Staff Report at 1.

³ Amended Application, A-19.

⁴ Zayo's affiliates that are a part of its "Zayo Bandwidth Group" which currently provides non-switched private line telecommunications services in 17 states and Zayo's "Onvoy Voice Services" group provides local exchange telecommunications services in 9 states. Amended Application at A-18.

⁵ Amended Application, A-18.

⁶ Amended Application Exhibit A.

⁷ Amended Application at B-1.

⁸ Amended Application at Attachment D.

13. As part of its review of Zayo's finances, Staff requested and Zayo provided three year projections for Zayo's assets, equity, and net income for the services it proposes in Arizona.⁹ Zayo anticipates that by the year 2012 it will have total assets of \$75,000, total equity of \$75,000 and a net income of \$100,000.¹⁰ Zayo states that initially it will rely on the financial resources of its parent company, Zayo Group, LLC, to provide its proposed services in Arizona.¹¹

14. Zayo's proposed tariffs state that it may require advances and/or prepayments from its customers.¹² Staff recommends that Zayo procure a \$100,000 performance bond or ISDLC for its proposed facilities-based local exchange services. Staff's witness testified that Staff is not recommending Zayo obtain a performance bond or ISDLC for its proposed private line services because Zayo's potential customers will be large businesses who have the bargaining power to negotiate the best prices for their services.¹³

Rates and Charges

15. Staff believes Zayo will have to compete with various ILEC, competitive local exchange carriers ("CLECs"), and interexchange carriers ("IXCs") currently providing the telecommunication services Zayo proposes to provide in Arizona.¹⁴

16. Given the competitive environment in which Zayo will be providing service, Staff believes Zayo will not be able to exert any market power and the competitive process will result in rates that are just and reasonable.¹⁵

17. Zayo's rates are for competitive services. Staff reviewed Zayo's proposed tariffs and believes Zayo's proposed rates are similar to those charged by other facilities-based local exchange and non switched private line providers in Arizona; and therefore, will result in rates that are just and reasonable.¹⁶

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⁹ Staff Report at 2.

¹⁰ Id.

¹¹ Amended Application at B-3.

¹² Amended Application at Attachment B-1.

¹³ Tr. at 22-23.

¹⁴ Staff Report at 3.

¹⁵ Id.

¹⁶ Id at 4.

Local Exchange Carrier Specific Issues

18. Staff recommends that pursuant to A.A.C. R14-2-1308(A) and federal laws and rules, Zayo should make number portability available to facilitate the ability of customers to switch between authorized local carriers within a given wire center without changing their telephone number and without impairment to quality, functionality, reliability, or convenience of use.

19. In compliance with A.A.C. R14-2-1204, all telecommunications service providers that interconnect into a public switched network shall provide funding for the Arizona Universal Service Fund ("AUSF"). Staff recommends that Zayo contribute to the AUSF as required by the A.A.C. and that Zayo make the necessary monthly payments as required under A.A.C. R14-2-1204(B).

20. In Commission Decision No. 59421 (December 20, 1995) the Commission approved quality of service standards for Qwest which imposed penalties due to an unsatisfactory level of service. In this matter, Zayo does not have a similar history of service quality problems, and therefore Staff recommends that the penalties outlined in the Qwest Decision should not apply to Zayo.

21. In areas where Zayo is the only local exchange service provider, Staff recommends that Zayo be prohibited from barring access to alternative local exchange service providers who wish to serve the area.

22. Zayo will provide all customers with 911 and E911 service where available, or will coordinate with ILECs, and emergency service providers to facilitate the service.

23. Pursuant to prior Commission Decisions, Zayo may offer customer local area signaling services such as Caller ID and Call Blocking, so long as the customer is able to block or unblock each individual call at no additional cost.

Complaint History

24. According to Zayo's amended application, it has not had an application for service denied in any state where it has applied for a certificate to provide telecommunication services.¹⁷

25. During its review of Zayo's application, Staff found that Zayo Group, LLC's, affiliate

¹⁷ Amended Application at A-11.

1 Zayo Bandwidth Tennessee, LLC, has been named as a defendant in a lawsuit filed by the City of
 2 Memphis, alleging Zayo Bandwidth Tennessee breached its obligations under a Franchise
 3 Agreement.¹⁸ According to Zayo, the City of Memphis claimed it could charge Zayo Bandwidth
 4 Tennessee a five percent gross revenue Franchise Fee and require Zayo Bandwidth Tennessee to turn
 5 over certain of its fiber assets to the City of Memphis, without compensation, under a City
 6 ordinance.¹⁹ Zayo Bandwidth Tennessee has filed a motion to dismiss the City's Complaint based
 7 on the courts previous decision finding that a franchise fee based on a percentage of gross revenues is
 8 "not reasonably related" to a telecom provider's use of the City's right-of-way.²⁰ Mr. Christopher
 9 Yost, general counsel for Zayo Bandwidth, LLC, testified that the District Court has granted Zayo
 10 Bandwidth Tennessee's motion to dismiss and that Zayou Bandwidth Tennessee is in the process of
 11 working with the City of Memphis to resolve the terms of the franchise fee agreement.²¹

12 26. Staff also contacted five state commissions where Zayo is authorized to provide
 13 telecommunications services and verified that Zayo is authorized to conduct business in those states
 14 and that no complaints had been filed against Zayo or its affiliates.

15 27. The Commission's Consumer Services Division reported no complaints filed in
 16 Arizona against Zayo from January 1, 2006 to March 25, 2009. According to Staff, no formal or
 17 informal complaints have been filed against Zayo with the Federal Communications Commission.

18 28. Based on the above information, Staff believes Zayo has the ability to provide quality
 19 telecommunications services in Arizona.²²

20 **Competitive Analysis**

21 29. Staff recommends approval of Zayo's proposed services as competitive. Staff states
 22 that Zayo will have to convince customers to purchase its services; has no ability to adversely to
 23 affect the competitive local exchange or ILEC markets; and alternative providers exist in the markets
 24 Zayo desires to serve. Therefore, Staff believes Zayo will not have any market power in the markets
 25 it wishes to serve and that Zayo's proposed services should be classified as competitive.

26 ¹⁸ Staff Report at 6.

27 ¹⁹ Zayo's response to Staff's Data Request STF 1.6.

28 ²⁰ Id.

²¹ Tr. at 16.

²² Tr. at 22.

30. Staff's recommendations as set forth herein, are reasonable and should be adopted.

CONCLUSIONS OF LAW

1. Zayo is a public service corporation within the meaning of Article XV of the Arizona Constitution, A.R.S. § 40-285, and A.A.C. R14-2-801 *et seq.*

2. The Commission has jurisdiction over Zayo and the subject matter of the application.

3. Notice of the amended application was given in accordance with the law.

4. A.R.S. §§ 40-282 allows a telecommunications company to file an application for a CC&N to provide competitive telecommunications services.

5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised Statutes, it is in the public interest for Zayo to provide the telecommunications services set forth in its amended application.

6. Zayo is a fit and proper entity to receive an CC&N authorizing it to provide competitive facilities-based local exchange services and resold and facilities-based private line telecommunications services in Arizona, subject to Staff's recommendations as set forth herein.

7. The telecommunications services Zayo intends to provide are competitive within Arizona.

8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules, it is just and reasonable and in the public interest for Zayo to establish rates and charges that are not less than Zayo's total service long-run incremental costs of providing the competitive services approved herein.

9. Staff's recommendations are reasonable and should be adopted.

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ORDER

IT IS THEREFORE ORDERED that the application of Zayo Bandwidth, LLC for a Certificate of Convenience and Necessity to provide facilities-based local exchange and resold and facilities-based private line telecommunications services in Arizona, is hereby approved, subject to Staff's recommendations as described in Findings of Fact Nos. 6 and 7.

IT IS FURTHER ORDERED that if Zayo Bandwidth, LLC fails to comply with Staff's conditions, as described in Findings of Fact No. 7, the Certificate of Convenience and Necessity granted herein shall be considered null and void after due process.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.


 CHAIRMAN



 COMMISSIONER


 COMMISSIONER


 COMMISSIONER


 COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 12th day of July, 2010.


 ERNEST G. JOHNSON
 EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

1 SERVICE LIST FOR:

ZAYO BANDWIDTH, LLC

2 DOCKET NO.:

T-20694A-09-0379

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